80-1139

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1980

ARKANSAS-BEST FREIGHT SYSTEM, INC.,
Cross-Petitioner,

vs.

GLENN P. KIRKLAND, ET AL.,
Cross-Respondents.

CROSS-PETITION OF ARKANSAS-BEST FREIGHT SYSTEM, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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January 7, 1981

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QUESTIONS PRESENTED

1. May a breach of contract in a suit under 29 U.S.C. § 185(a) be predicated upon procedural irregularities in the operation of the arbitration procedure where the uncontroverted evidence establishes that the parties acted in accordance with their past interpretation of the procedural requirements and the terms of the collective bargaining agreement?

2. May the employer be held liable for damages under 29 U.S.C. § 185, where the employer at all times acted in accordance with the terms of the collective bargaining agreement and the parties' past practices thereunder?

TABLE OF CONTENTS

Questions Presented 1
Table of Authorities III
Opinion Below 2
Jurisdiction 2
Statute Involved 3
Statement of the Case 3
Reasons for Granting the Cross-Petition for Writ of Certiorari 7
I. The Eighth Circuit Erred In Refusing To Require The District Court To Abide By The Parties' Agreed-Upon Method For Resolving Disputes 8
II. The Eighth Circuit Erred In Permitting The District Court To Ignore The Uncontroverted Evidence Concerning The Parties' Past Practices 11
III. The District Court Erred In Failing To Apportion Damages 12
Conclusion 13

Table of Authorities

CASES

Barrett v. Safeway Stores, Inc., 538 F.2d 1113 (8th Cir. 1976) 11
Battle v. Clark Equipment Co., 579 F.2d 1338 (7th Cir. 1978) 13
Cronin v. Sears, Roebuck & Co., 588 F.2d 616 (8th Cir. 1979) 11

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Drivers Union v. Riss & Co., 372 U.S. 517 (1963) 9
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 13
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 9
Sanderson v. Ford Motor Co., 403 F.2d 102 (5th Cir. 1973) 12
Steelworkers Trilogy: United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593 (1960) 9
Teamsters Local 30 v. Helms Express, Inc., 591 F.2d 211 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979) 9
United Mineworkers v. Barnes & Tucker Co., 561 F.2d 1093 (3d Cir. 1977) 9
Vaca v. Sipes, 386 U.S. 171 (1967) 12
Warren v. Teamsters, 544 F.2d 334 (8th Cir. 1976) 9
Wyatt v. Interstate & Ocean Transport Co., 439 F. Supp. 1310 (E.D. Va. 1977) 13

STATUTES AND RULES

28 U.S.C. § 1254(1) 2
29 U.S.C. § 173(d) 8
29 U.S.C. § 185 3
Supreme Court Rule 17.1 8
Supreme Court Rule 19.5 2

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CROSS-PETITION OF ARKANSAS-BEST FREIGHT SYSTEM, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Petitioner, Arkansas-Best Freight System, Inc.,[1] respectfully prays that this Court, in the event that it

1. The following is a list of all parties:

Cross-Petitioner: Arkansas-Best Freight System, Inc., which is a wholly owned subsidiary of Arkansas Best Corporation. Neither company has any affiliates other than wholly owned subsidiaries.

Cross-Respondents: Keith Alsip, Thurman Arman, James Barnhouse, L. B. Barrentine, Sylvester Bechtel, Jr., Maxie O. Blanton, Joe Brewer, Jack L. Brewington, Tommy R. Burgess, James C. Burkett, Utah H. Caldwell, Harold Carr, Charles Carter, Charles W. Coble, Floyd E. Cockrum, Carl T. Cooper, Douglas W. Daniel, Carroll E. Davidson, Charley W. Deaton, Oscar Derrington, Jr., James R. Dye, Clyde G. Edwards, Gene Ellis, M. R. Garner, G. A. Ghent, Bruce Gray, Jr., James P. Griffin, Ray D. Halstead, Kenneth J. Hamby, James D. Hammock, Raymond Hawkins, Dale T. Healea, Jr., Odus Howard, William D. Jefferson, Harold D. Kauffman, Cleo Keeney, James W. Kinsey, Glenn P. Kirkland, Harbert Lemay, John E. Lindquist, James Lovell, Robert H. Marshall, Bobby M. Mason, H. D. Matthews, James H. Mauldin, Lon McDonald, Jr., William N. McDonald, Jr., Charles E. Middleton, Aubrey J. Milam, R. C. Moore, William S. Moyer, Larry W. Patterson, Sr., Deamus

(Continued on following page)

grants Cross-Respondents' Petition for Writ of Certiorari in Case No. 80-893, also issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, entered on August 25, 1980, on the question of whether the Eighth Circuit erred in affirming the district court's finding that Arkansas-Best Freight System, Inc. was liable for a breach of the collective bargaining agreement.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 629 F.2d 538 (8th Cir. 1980), while the order denying rehearing is not yet offically reported. (P.A. at A54)[2] The opinion of the district court is reported at 475 F. Supp. 180 (E.D. Ark. 1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 25, 1980. Cross-Respondents' Petition for Rehearing was denied on October 6, 1980. Cross-Respondents' Petition for Writ of Certiorari in No. 80-893 was received by Cross-Petitioner on December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. Rule 19.5.

Footnote continued—

Reeves, John H. Richards, Charles R. Robinson, W. D. Rogers, Edison R. Runyan, Jimmy N. Scates, Wilborn E. Shaw, Arvin E. Skidmore, Cleveland Smith, Harold T. Stapleton, James M. Staton, Robert A. Thomason, Henry E. Thompson, Harry D. Wells, Roy C. Wetherington, Ted Wheeler, Ralph E. Williams, Dorris L. Wilson, Central States Conference of Teamsters; Southern Conference of Teamsters; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

2. References to "P.A." are to the Appendix to the Petition in Case No. 80-893, at this Term.

STATUTE INVOLVED

United States Code, Title 29:

Section 185(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b). Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against its assets, and shall not be enforceable against any individual member or his assets.

STATEMENT OF THE CASE

In early 1975, cross-petitioner, Arkansas-Best Freight System, Inc. (hereinafter "ABF"), decided that it was necessary to exercise its undisputed right under the National Master Freight Agreement (hereinafter "NMFA")[3]

3. The National Master Freight Agreement is the collective bargaining agreement governing the terms and conditions of ABF's employees and in particular of cross-respondents herein.

to change its method of operations by relocating certain driver positions from terminals located in the south to terminals located in the northeast, principally in the state of Ohio. (P.A. at A7) As required by Article 8, Section 6 of the NMFA, ABF submitted the desired change of operations, along with a proposal for handling the seniority of all affected employees, to a change of operations committee, which is empowered under the NMFA to make a final and binding determination of the seniority of affected employees. (P.A. at A5-A6) The change of operations committee provided by Article 8 of the NMFA is composed of an equal number of employer and union representatives. The employer representatives, however, are employees of other truck lines, all of whom are appointed by employer conferences. ABF had no power to appoint any committee member. Due to objections to the seniority provisions, ABF's first two proposals were withdrawn.[4] In September of 1975, ABF's third proposal was approved. Under this plan, ABF eliminated 14 driver positions in the south by closing its Fort Smith, Arkansas terminal and reduced by 25 the number of driver positions at its Little Rock, Arkansas terminal. (P.A. at A11-A12) All of the affected employees were given the right to transfer to northeastern terminals with retention of their full seniority. *Id.*

Cross-respondents are employees of ABF who, prior to the change of operations, were domiciled at either Fort Smith or Little Rock, Arkansas. Cross-respondents instituted suit against ABF and the International Brotherhood of Teamsters and two of its affiliates, the Central Conference of Teamsters and the Southern Conference of

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4. The first proposal was objected to because it called for the elimination of 68 positions in the south but created only 61 positions in the northeast. (P.A. at A8) The second proposal was objected to because it called for a novel paper bidding procedure. (P.A. at A11)

Teamsters, claiming that ABF's change of operations itself constituted a breach of the NMFA and that the union defendants had violated their duty of fair representation in approving the change. Jurisdiction was predicated on § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

The case was tried to the court, which recognized that ABF had an absolute right under the NMFA to change its operations to relocate driver positions from the south to the northeast. (P.A. at A51) The district court also concluded that the change of operations itself and the committee's decision concerning the seniority of employees affected by the change did not violate the National Master Freight Agreement. (P.A. at A15)

The district court, however, found certain procedural irregularities in the manner in which the the change of operations committee had reached its permissible decision. (P.A. at A15-A17) Although ABF had no power to determine the makeup of the change of operations committee, the district court found ABF liable because the court believed that the change of operations committee had not been constituted in accordance with the committee's rules of procedure. *Id.* The district court reached this conclusion despite the fact that all of the evidence concerning the interpretation of the procedural rules unequivocally established that the parties had in the past consistently interpreted the rules to permit committees to be constituted as the subject committee had been. (TR at 1297, 1298, 1323-24, 1760-61, 1764-65, 1769) The district court also found the committee's procedural rules to have been violated by the presence on the committee of an individual who owned approximately 4/10,000's of 1% of stock in the parent company of ABF. (P.A. at A15-A17) This individual was a former employee of ABF who at the time of the committee

hearings was employed by one of ABF's competitors and had been employed by several other companies since leaving ABF. The district court held ABF liable as a result of this individual's membership despite the fact that ABF had played no role in his appointment and every individual who testified concerning the industry's past practices indicated that stock ownership had never been considered as a ground for disqualifying an individual as a member of the change of operations committee. (TR at 1367, 1370-71, 1385-87) The district court also found that a complete transcript of the proceedings before the change of operations committee had not been kept. (P.A. at A15-A17) The district court reached this conclusion despite the fact that every individual except one who testified indicated that the transcript was accurate. (TR at 628-30, 677-82, 209-10, 570-71, 1246-47, 1646, 1785) Finally, the district court found that the principles of fundamental fairness had been violated because an ABF employee had contacted members of the change of operations committee prior to the hearing and discussed the general provisions of the change. (P.A. at A15) The court reached this conclusion despite the fact that all individuals who testified on this subject indicated that the long-standing practices in the industry required such contacts in order to better familiarize the committee members with the changes of operations. (TR at 1304, 1306, 1336, 1348, 1354-55, 1392, 1395-97, 1752-54)

The court concluded that these procedural irregularities constituted a breach of the NMFA, which in conjunction with the union's breach of its duty of fair representation entitled the cross-respondents to relief. The court entered an order decreeing injunctive relief and setting forth an elaborate formula for the recovery of damages, which eventually resulted in 70 damage awards aggregating $258,868.78. (P.A. at A31-A33)

On appeal, ABF asserted that the district court had erred by rejecting the uncontroverted evidence concerning the parties' past practices and interpretations of the change of operations procedure under the NMFA and by concluding that these long-standing practices constituted a breach of the collective bargaining agreement. The Eighth Circuit Court of Appeals did not address this argument. Neither did it distinguish or otherwise discuss the authority cited by ABF in support of its contentions. The Eighth Circuit instead concluded that "in general" it agreed with the district court's findings of liability. (P.A. at A44) The Eighth Circuit cited no authority supporting this general agreement.

ABF also contended on appeal that the district court had erred in awarding damages because no causal connection had been established between plaintiffs' losses and the procedural improprieties that were found to be a breach of the collective bargaining agreement. ABF also contended that the district court had erred in refusing to apportion the damages. The Eighth Circuit Court of Appeals did not reach the issue concerning apportionment of damages because it vacated the damage awards on the ground that "the plaintiffs failed to prove damages caused by the errors in connection with the proceedings before the change of operations committee . . . ."

REASONS FOR GRANTING THE CROSS-PETITION FOR WRIT OF CERTIORARI

In the event this Court grants cross-respondents' petition for certiorari in Case No. 80-893 and thereby creates the possibility, however remote, of the reinstatement of the large damage award vacated by the Eighth Circuit, this Court should also grant this petition for a writ of certiorari in order to permit consideration, not only of the

purported errors in the damage award, but also of the errors in the underlying finding of liability upon which the damage award was initially predicated.

In refusing to reverse the district court's finding of liability, it is clear that the Eighth Circuit failed to acknowledge the decisions of this Court and of other circuit courts which unquestionably establish the principle that deference is to be accorded to the "method agreed upon by the parties" for the final resolution of disputes arising under collective bargaining agreements. This conflict between the decision below and the decisions of other courts constitutes a basis for granting the writ for certiorari. Moreover, by refusing to reverse the district court's interpretation of the procedural requirements for the change of operations committee, which interpretation was in direct conflict with the uncontroverted evidence of the parties' past practices under the NMFA, the Eighth Circuit failed to follow its own past decisions, which clearly hold that courts are to defer to the parties' own interpretation of the meaning of their collective bargaining agreement. The Eighth Circuit's failure to follow its own precedents constitutes a departure "from the accepted and usual course of judicial proceedings . . . [sufficient] to call for an exercise of this Court's power of supervision." Sup. Ct. Rule 17.1.

I.

The Eighth Circuit Erred In Refusing To Require The District Court To Abide By The Parties' Agreed-Upon Method For Resolving Disputes

Congress has clearly expressed its belief that federal labor policy precludes federal courts from second-guessing the parties' procedure for resolving labor disputes. Section 203(d) of the National Labor Relations Act, 29 U.S.C. § 173(d), provides in pertinent part as follows:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . . .

This Court has clearly indicated that federal courts are required to defer to the final and binding determinations reached by the parties' agreed-upon method. *Steelworkers Trilogy*: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593 (1960). This rule has clearly been applied to individual employee suits under § 301. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967). This Court has also recognized that the same deference should be accorded to an agreed-upon method that provides for resolution of disputes, not through neutral arbitration, but by means of a joint employer-union committee. *Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963). This concept that deference is due the method chosen by the parties regardless of whether it involves neutral arbitration was recognized in *United Mineworkers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d Cir. 1977);

> It is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration.

See also Warren v. Teamsters, 544 F.2d 334, 340 (8th Cir. 1976); *Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d 211, 218 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979).

It is apparent that the Eighth Circuit failed to enforce this federal labor policy. There was absolutely no evidence before the district court indicating that the parties had failed to follow their agreed-upon procedure for making a final and binding determination of seniority conflicts among employees affected by the change of operations. Indeed, the uncontroverted evidence clearly established that the contractual procedure had operated exactly as the parties had intended it to as evidenced by their past practices. The Eighth Circuit, however, by refusing to reverse the district court, permitted that court to rewrite as it saw fit the method by which the parties were to resolve such seniority disputes. Thus the district court was permitted to decide that a change of operations committee must be constituted in a manner different from the parties' consistent interpretation of their procedural rules and the applicable contract language, which only requires the committee to be "equally composed of employer and union representatives." (Pl. Ex. 1 at 40) Likewise, the district court was allowed to prevent an otherwise qualified and highly experienced former ABF employee from serving as a committee member solely because of an infinitesimal stock interest, despite the parties' clear belief that such disqualification was not necessary. In a similar vein, the district court was permitted to conclude that the parties' procedure could not permit the employer to discuss the nature of the change of operations with committee members prior to the actual hearing, despite the parties' obvious belief that this was not only permissible but necessary to the proper operation of the procedure.

By permitting the district court to find that ABF, although it had unquestionably acted in accord with the parties' past practices and interpretations of their collective bargaining agreement, had acted in violation of principles of fundamental fairness and had thereby breached

the NMFA, allowed the district court, not only to refuse to defer to the parties' agreed-upon method, but in addition to restructure that agreed-upon method to satisfy the district court's own beliefs. Thus, the Eighth Circuit permitted the district court to rewrite the parties' collective bargaining agreement, a result that clearly conflicts with the decisions of this Court and of other circuit courts.

II.

The Eighth Circuit Erred In Permitting The District Court To Ignore The Uncontroverted Evidence Concerning The Parties' Past Practices

As noted, the uncontroverted evidence before the district court indicated that the parties had always (1) established committees in the manner in which the subject change of operations committee was constituted, (2) permitted former employees who might own an infinitesimal amount of stock in a participant company to act as members of the committee, and (3) permitted representatives of the employer to discuss the nature of their change of operations with committee members prior to its actual hearing. In prior decisions, the Eighth Circuit had unquestionably recognized that where the parties had consistently interpreted their collective bargaining agreement in a certain manner, that interpretation was binding upon the courts. In *Barrett v. Safeway Stores, Inc.*, 538 F.2d 1113, 1114 (8th Cir. 1976), the following observation is made:

> The parties' own mutual interpretation of the contract is entitled to considerable weight; and "[w]hen parties by their uniform conduct over a period of time have given a contract a particular construction, such construction will be adopted by the courts."

See also Cronin v. Sears, Roebuck & Co., 588 F.2d 616 (8th Cir. 1979). The same rule has been followed by other cir-

cuit courts. *See Sanderson v. Ford Motor Co.*, 403 F.2d 102 (5th Cir. 1973).

By refusing to reverse the district court, the Eighth Circuit permitted it to reject the parties' longstanding interpretation of their collective bargaining agreement and to substitute the district court's own contrary interpretation. By thus failing to require the district court to follow its precedents, the Eighth Circuit departed from the accepted and usual course of judicial procedure. This departure is sufficiently serious to justify this Court's review by writ of certiorari.

III.

The District Court Erred In Failing To Apportion Damages

On appeal, ABF also contended that the district court had erred in imposing joint and several liability upon the unions and ABF. ABF submitted that the district court should have vacated the damage award against it or should have apportioned the damages according to the relative fault of each. The court of appeals did not reach this issue in that it vacated all of the damage awards, thereby mooting the apportionment issue. If this Court, however, grants the petition for certiorari in Case No. 80-893, then the Court should consider the propriety of the district court's refusal to apportion damages.

This Court has made it clear that damages awarded under § 301 should be apportioned between the employer and the unions according to the relative fault of each. *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967). Courts have also recognized that in those situations where the employer has failed to rectify the breach of contract due to its good faith reliance on a favorable decision of the contractual grievance machinery, which decision later proves

to be invalid as a result of the union's bad faith, the union should be held accountable for contractual damages accruing after the point in time when the employer's good faith error should have been rectified. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572 (1976) (Stewart, J., concurring); *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978); *Wyatt v. Interstate & Ocean Transport Co.*, 439 F. Supp. 1310 (E.D. Va. 1977). Clearly, the district court erred in refusing to vacate the award of damages against ABF and to apportion damages according to the fault of the parties. Had the Eighth Circuit not vacated those awards, it would have been required to reverse the decision and to remand it for such action. Clearly, the district court erred in holding ABF liable for any portion of the damage awards because ABF had no control over the composition of the change of operations committee and had always acted in accordance with the terms of the collective bargaining agreement and the long-standing industry practices thereunder. Consequently, ABF had no responsibility for the conduct found to have violated the NMFA and a proper assessment of damages would have relieved it of all liability.

CONCLUSION

Cross-respondents have filed a petition for a writ of certiorari in Case No. 80-893 requesting this Court to review a portion of the Eighth Circuit's opinion in this case. For the reasons set forth in ABF's brief in opposition to that petition, ABF submits that no issue worthy of review by this Court is raised by that petition. ABF has filed this cross-petition solely because it believes that, in the event this Court should grant the original petition, this Court should be permitted to consider the Eighth Circuit's opinion in full and in particular the Eighth Circuit's refusal to reverse the district court's finding of liability.

By refusing to reverse the finding of liability, the Eighth Circuit permitted the district court to refuse to defer to the parties' agreed-upon procedure for resolving disputes under their collective bargaining agreement and consequently acted in conflict with the decision of this Court and of other circuit courts. Moreover, by refusing to reverse the district court's finding of liability, the Eighth Circuit permitted the district court to reject the parties' own interpretation of their collective bargaining agreement. In so doing, the Eighth Circuit permitted the district court to reach a result in conflict with the Eighth Circuit's past precedents and thus departed from the usual course of judicial proceedings. For the foregoing reasons, ABF submits that its cross-petition for certiorari should be granted.

Respectfully submitted,

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January 7, 1981

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